
(1972) 03 BOM CK 0023

In the Bombay High Court

Case No : Special Civil Application No. 2764 of 1968

Krishna Laxman Yadav and Others

APPELLANT

Vs

Narsingh Rao Vithal Rao Sonawane and Another

RESPONDENT

Date of Decision : 02-03-1972

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 28
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9, 9
Transfer of Property Act, 1882 — Section 108

Citation : AIR 1973 Bom 358 : (1973) 75 BOMLR 29 : (1973) MhLj 225

Hon'ble Judges : Vaidya, J; K.K. Desai, J

Bench : Division Bench

Advocate : S.C. Pratap, for the Appellant; S.M. Mhamane and S.K. Vaidya, for the Respondent

Judgement

K.K. Desai, J.—This is a petition on behalf of the original plaintiffs in Small Causes Court Civil Suit No. 1543 of 1962 instituted at Poona. Respondent No. 1 is the original defendant-landlord.

2. The Respondent No.1 owns a house bearing City Survey No. 24 situate at Somwar Peth, Poona. The house consisted of different small tenants on the ground and two floors. The Petitioners Nos. 1 to 7 occupied different tenements at monthly rents. In consequence of the Panshet floods which occurred on 12th July 1961, the house was flooded with waters and excessively damaged. By a notice given in August 1961, the Municipal Corporation of Poona directed the Respondent No.1 to remove first and second floors of the house as being dangerous to human life. The tenants claimed that the notice should be withdrawn but the Corporation refused to withdraw the notice. A large part of the house fell down in November 1961 and the Municipal Corporation ultimately removed the house to level of the plinth and called upon the Respondent No.1 to remove the debris. After the debris was removed, the Respondent No.1 completed the formalities of having a plan sanctioned and commenced to construct a new building at the site of the old house. The Petitioners thereupon

filed the above suit in the end of April 1962, claiming a declaration that their tenancies had not been extinguished and they were entitled to occupy as tenants in newly constructed tenements at the place equivalent to the original tenements occupied by them. They further claimed mandatory injunction directing the Respondent No.1 to deliver possession to each of them of equivalent tenement at the same places as the old tenements. They further claimed permanent injunction for restraining the Respondent No.1 from letting out the tenements in the new building to outsiders-third parties. Having regard to the contention made by the Respondent No.1, four main issues were raised by the trial Court as follows : -

- "(1) Whether the Plaintiffs are tenants of the suit premises?
- (2) Whether the Plaintiffs can ask for possession of the suit premises ?
- (3) If yes, what is the standard rent of the suit premises?
- (4) Is the suit barred by misjoinder of parties?"

The trial Court held that the plaintiffs continued to remain tenants and were entitled to possession of equivalent premises in the new building, it was not necessary to fix standard rent and the suit was not barred by misjoinder of parties. The lower appellate Court reversed the decree passed by the trial Court by holding that the suit was barred by misjoinder of parties and further that as the new building had not been completed it was difficult to say which premises could be given in possession even if it was held that the Petitioners as tenants had such right. The suit for mandatory injunction was, therefore, clearly premature and further that the declaration claimed by the Petitioners to be tenants was also premature. These Petitioners filed the present writ petition for challenging the correctness of the appellate judgment of the lower appellate Court.

3. Mr. Pratap for the Petitioners has contended that it was not the case of the Respondent No.1 that he had by notice to quit terminated the contractual tenancies of the petitioners. The mere fact that the house collapsed and became destroyed, was insufficient to make a finding that the Petitioners had not continued to be contractual tenants of the Respondent No.1. He further submitted that the correct position in law was that whenever a landlord put up any new construction on the same land as was under old damaged house the hold tenants as contractual tenants would become tenants in respect of new premises and/or tenements situated at about the same places where the original tenements were situated. He, therefore, submitted that the declaration as granted by the trial Court was correct. He further submitted that having regard to the facts on which there was no dispute, the Petitioners'-Plaintiffs-right to relief had arisen out of the same act or transaction, viz., destruction of the building of floods and in pursuance of notices of the Municipal Corporation and on the basis of these same important facts the Petitioners were each and all entitled to the reliefs claimed in the suit. The fact that the relief could be only several in

respect of the premises to which each of the Petitioners was separately entitled, did not make the suit multifarious. The reason was that, as is evident from the pleadings, common questions of law and facts had arisen between the parties to the suit from out of the same transaction.

4. Mr. Mhamane for the Respondent No.1 repeated the contentions made on his behalf before the two Courts below and also raised a further contention that the Court of Small Causes at Poona was not competent to try the suit. In his submission that Court had no jurisdiction to try the suit.

This submission was developed by pointing out that the Petitioners were not tenants of any existing premises. The tenancies of the Petitioners were destroyed by reason of the accidental destruction of the whole of the building. In his submission, the petitioners could not be entitled to protection under the Bombay Rents, Hotel and Lodging House Rates (Control) Act. This was so, because, for such protection premises must be in existence. There could be no such protection in respect of a wholly destroyed premises. In support of his submission he relied upon the decision of a Division Bench of this Court in Appeal No. 557 of 1952 (Bom.) and the observations made by Mr. Justice Bhasme when he followed the above Division Bench decision in Special Civil Application No. 973 of 1966 (Bom.). Mr. Mhamane further submitted that the Respondent No.1 was not a landlord in respect of any existing premises let out to the Petitioners. The Petitioners could never, therefore, be held to be tenants of the Respondent No.1. In his submission, unless and until the Petitioners were paying rents, they could not be tenants. He also emphasised that the suit had been rightly held to be barred by misjoinder of parties.

5. In connection with the observations in Appeal No. 557 of 1952. Mr. Pratap submitted that the facts in that case were decided on the footing of the contractual tenancy having been extinguished and not the observations of the Court would have been altogether different if the contractual tenancy was found to have continued in existence at relevant time. In that connection he relied upon the decision of the Full Bench of this Court in the case of Dattatraya Krishna Jangam Vs. Jairam Ganesh Gore, and also on the decisions of the English Courts in *Simper v. Coombs*, (1948) 1 All ER 306 and *Denman v. Brise*, 1948 (2) All ER 141.

6. On the question of jurisdiction raised by Mr. Mhamane, it requires to be noticed that Section 28 of the Rent Act makes the Court of Small Causes a Court of exclusive jurisdiction in respect of suits and proceedings between a landlord and a tenant relating to the recovery of possession of any premises to which the provisions of Part II of the Act are applied. It is well settled that in connection with the question of jurisdiction the facts mentioned in the plaint and the nature of the plaint are the only relevant matters which can be looked at. There was no dispute between the parties that the Part II of the Rent Act had been extended to Poona and in all normal circumstances questions relating to recovery of possession of the house of the Respondent No.1 were liable to be adjudicated

upon only by the Court of Small Causes at Poona. There was no dispute between the parties that each and all the Petitioners were tenants of the Respondent No.1 in respect of original house. It was also not denied on behalf of the Respondent No.1 that if the house had continued to exist, the Petitioners were bound to institute their suits in the Court of Small Causes at Poona. What, according to MR. Mhamane, made the difference in the above situation was that the premises let out to the Petitions had ceased to exist. In his submission the fact, that the premises let out had ceased to exist, was sufficient for a finding that the Court of Small Causes had no jurisdiction to decide the Petitions' suit. He justified this submission because in Appeal No. 557 of 1952 (Bom) a Division Bench of this Court held :-

"..... Under our law what is protected is "premises" as defined in the Act and the "premises" as defined by the Act is any building or part of a building let separately including any land appurtenant thereto. Now, it is not possible to take the view that if the land exists without the building, it would still be "premises" within the meaning of the Act Therefore, if on the 18th of June, 1947 there was no building in existence, we cannot say that the tenant could claim statutory protection only with regard to the land which was in existence on that date"

7. Though at first blush the above observations appear to be in favour of Mr. Mhamane, the ratio of the above observations has not that effect. The reason for this finding is that the above observations came to be made on the basis of the fact that it was admitted in that case that contractual tenancy between the landlord and the tenant in that case had come to an end. The tenant's claim for protection as regards the possession of the premises was based on the provisions in the Rent Restriction Act. It was for this reason that the Division Bench at more than one place referred to the fact that the contractual tenancy had come to an end and the material date was subsequent to the date of the termination of contractual tenancy and that then a dwelling house of which it could be said that the tenant was in possession was not in existence. This was the main basis on which finding was made that the tenant was not entitled to protection under the Rent Restriction Act. Now, it requires to be noticed that in the present case, at all stages, including the arguments before us, both sides have repeatedly mentioned that the contractual tenancies of the Petitioners had never been put to an end. The case of the Petitioners was that the law of the land is that whenever a landlord puts up a new construction in the place of the old construction and the tenancy of the tenant has not been ended, the tenant has a right to claim the tenancy in the newly constructed building in respect of the portion which is at about the same site as the tenement in the destroyed house. The plaint is the suit is on the assumption of the above being correct position in law. There was no dispute between the parties that the new building that the Respondent No.1 was about to construct was to consist of small rooms which were essentially to be let out to third parties on tenancy. Now, these rooms in the new building, therefore, could justifiably be described as premises within the meaning of that

phrase in sub-clause (b) of clause (8) of Section 5 of the rent Act. This clause runs as follows : -

""Premises" means -

(a)

(b) any building or part of a building let separately"

We have no doubt that the Petitioners' claim for declaration relates to the building which would be within the meaning of the above phrase as defined in clause (8) of Section 5. The claim was on the footing that the Petitioners were tenants of the premises in respect whereof the declaration was claimed. There was no dispute by the Petitioners that in respect of such premises they would be liable to pay rents as tenants.

8. In this connection, as pointed out by Wagle, J., in the matter of C. R. A. No. 1177 of 1965, decided on 12-7-1966 (Bom), regarding the true construction and effect of Section 28 the observations of the Full bench in the case of Dattatraya Krishna Jangam Vs. Jairam Ganesh Gore, are extremely important. The relevant observations are : -

"In order to determine which Court has jurisdiction to try a suit, the Court should read the plaint as a whole and ascertain the real nature of the suit and what in substance the plaintiff has asked for. Whatever may be the form of relief claimed, if on a fair reading of the plaint it becomes apparent that the plaintiff has alleged the relationship of landlord and tenant between him and the defendant and the relief claimed in substance relates to recovery of rent or possession then it is the Special Court alone that will have jurisdiction to decide the suit. If a dispute is subsequently raised by the defendant about the existence of relationship of landlord and tenant, the continuance of the suit in the Special Court will depend on the decision of the Court on this issue"

Further relevant observations are : -

"One of the matters in respect of which exclusive jurisdiction is conferred on the special Court is any suit or proceeding between a landlord and a tenant relating to the recovery of the rent or possession of any premises to which any of the provisions of Part II of the Act apply. Three conditions must be satisfied before a suit or proceedings can be said to be of this nature. It must be a suit or proceeding between a landlord and a tenant. The suit or proceeding may be instituted either by a landlord or by a tenant, but it must be in his capacity as the landlord or the tenant as the case may be. It must also be against the tenant or landlord, though persons deriving title through or under him may also be made parties to the suit. The suit or proceeding must also be in respect of premises to which any of the provisions of Part II of the Act apply. The third condition which is to be satisfied is that the suit or proceeding must relate to recovery of rent or possession of such premises."

Now, we are bound to follow the ratio of the above observations in this matter. We are unable to hold in favour of the Respondent No.1 that the above three conditions are not satisfied in the suit of the Petitioners. The claim of the Petitioners is that they are the tenants and the Respondent No.1 is the landlord. The Petitioners have filed the suit in their capacity as tenants. The suit is in respect of the premises of which the Petitioners claim to be tenants. We are, therefore, unable to accept the first submission made by Mr. Mhamane that the suit was not filed in a competent Court and the Court of Small Causes at Poona had no jurisdiction to try the suit.

9. With reference to the first two contentions, it is necessary to notice that there can be no dispute that a lease and a tenancy involves transfer of rights in immovable properties and the interest transferred will not revert to the landlord in ordinary circumstances except upon termination of such interests in accordance with the provisions in Section 106 read with Sections 111, 113 and the other relevant sections in Chapter 5 of the Transfer of Property Act. There is no law preventing letting out and/or lease of broken and tumbled down and/or damaged houses. It is also well settled that contracts for transfer of immovable properties including agreements for lease are liable to be specifically enforced. In other words, parties to such contracts and agreements will be subjected to such orders as are necessary for specific performance of such contracts and agreements. These rights existed in favour of the lessees and/or tenants in ordinary law and in that connection protection under the Rent Restriction Act was never necessary. The protection that was given under the above Act was against the ejectment of tenants. It is important to notice that under Sections 16 and 17 to enable a landlord to rebuild a new property ejectment of tenants was authorised. In Sections 17-B and 17-C provision was made for giving specific rights to tenants concerned to reoccupy the repaired and or newly built up remises. The provisions in the Act go to indicate that even under the Act tenants' right to reoccupy repaired or newly constructed building-premises has been recognised. the above discussion goes to show that even prior to the above Act and thereafter also the normal rights of a tenant for specific performance have always been recognised at Law. The only condition for specific enforcement would be such as provided in the Specific Relief Act. In other words, for getting specific performance the tenant must be ready and willing to perform his part of the covenants in the lease and/or otherwise agreed between the parties. It is, therefore, clear that a tenant who is willing to satisfy the above condition must always be entitled to relief of specific performance in cases in which there is no physical impediment in granting such reliefs. In this connection reference can be made to the two English cases on which reliance has been placed on behalf of the Petitioners. In the case of (1948) 1 All ER 306. Denning, J. as he then was, in connection with the rights of the lessee of a house destroyed in an enemy action, made the following observations:

"The position at common law is plain. She had a contractual tenancy, and that tenancy had never been determined by due notice to quit. It, therefore,

continues in existence. The destruction of the house by a bomb did not determine the tenancy. It is well settled that the destruction of a house does not by itself determine the tenancy of the land on which it stands No doubt, the landlord still has the contractual right to determine the tenancy The tenancy, therefore, remains in being. The fact that a new house has been erected on the site does not make any alteration to the legal position That house is substantially the same as the old one. It is annexed to and part of the land which was let under the tenancy and, therefore, it is now included in ;the tenancy which has never been determined. The tenant, Mrs. Simper, is still the tenant of the premises, and is entitled to possession of them."

It appears from the observations in the case cited that in the appeal against the decision of Denning, J. before the House of Lords, the above legal propositions have not been questioned. The case of (1948) 2 All ER 141 also related to a dwelling house which was destroyed by enemy action and was let out on a monthly tenancy. The landlord erected a new house on the site of the old one and when the new house was fit for occupation, the tenant's attempt to reoccupy the same was defeated by the landlord. The landlord then served a notice to quit on the tenant determining the contractual tenancy and the tenant filed his action for specific performance of his right as a tenant and claimed possession. The Court found that at the date when the house was destroyed by enemy action the tenancy had not been determined and the Court would not permit the landlord to exclude the tenancy from the protection of the Rent Restriction Act by taking advantage of his wrongful act in refusing the tenant physical occupation and then terminate the tenancy by notice to quit. The Court observed that the rights created in a tenant could not come to an end by frustration. The contract of tenancy continued between the parties in spite of the destruction of the house and as already stated above granted specific performance to tenant-plaintiff by directing the landlord to deliver possession. In that connection, Lord Justice Tucker observed:-

"..... I think it is clear, from all the authorities that broadly speaking the proposition has long been recognised that only an occupying tenant can claim the protection of the Rent Restrictions Acts but, in my view, the tenant here is not primarily claiming protection under the Acts. He is claiming to be put into possession of premises of which, at the material date, February 17, he was the contractual tenant. It is the landlord who is really seeking to make use of Rent Restrictions Acts by saying: "Because at a date subsequent to February 17 I gave you a notice to quit and you are, through my own act, not the occupying tenant, I am entitled to claim the benefit of that notice to quit and you on your part are not entitled to claim the benefit of your tenancy." I think that would be a position which would be contrary to one's ideas of justice and equity and that any Court must have power in circumstances such as the present to order that the landlord shall put the tenant back into the position in which he should have been on February 17. He having been put into that position, the subsequent

rights of the parties can, no doubt, be worked out in the appropriate proceedings to ascertain how they stand under the provisions of the Rent Restrictions Act"

10. The above observations are opposite and completely applicable to the facts of this case. The petitioners in this case are in the position of the plaintiff in the case of *Denman v. Brise*. The landlord in that case tried to take advantage of the fact that he had terminated the tenancy by issuing notice to quit, though at late date. In the present case the landlord is not in a position to take such advantage as admittedly he has not issued any notice to quit on the Petitioners. If the law as discussed, and as pronounced in the above case, is correct the Petitioners must be held to have been entitled to the decree that was passed by the trial Court.

11. Further contention made by Mr. Mhamane was that the petitioners would not be entitled to any specific performance because the premises which were given to the petitioners were destroyed and no new building structure had been put up on the land on which the original house was situated. There is evidence on record showing that the Respondent No.1 himself admitted that on the land in question he had already put up a construction consisting of four rooms. Having regard to the Petitioners' suit he had stopped proceeding to complete the whole construction as he had originally intended to do. The plans sanctioned by the Municipal Corporation go to show that he had intended to put up a new building. As already discussed above, the new construction of small room tenements which the first Respondent is about to complete on the land on which the original house was situated must be made available to the Petitioners for occupation as tenants of the first Respondent. The right of occupation is incidental to the contract of tenancy which has continued to exist between the parties. The tenants would be entitled to specific performance of their rights in respect of the construction that will be put up. The Petitioners would be entitled to occupy the tenements, of equal proportion and at about the same place as in the original house. We are unable to accept Mr. Mhamane's submission in connection with the above rights of the Petitioners that the failure of the first Respondent to complete the new construction was good defence. The existence of new construction was unnecessary for granting the relief claimed in the suit.

12. There is no substance in the contention that the suit was bad for misjoinder of parties. The only substantial question which arose between the parties was the question about right of the Petitioners as tenants of the old destroyed house in new construction that was being put up by the first Respondent. As regards all other facts, there was no dispute between the parties. This was a common question of law which had arisen by reason of the destruction of the house in consequence of the Panshet floods. The relief claimed was essentially several and did not exist jointly in favour of the Petitioners-plaintiffs. That fact was irrelevant in deciding the question of multifariousness. The result of the provisions of Order 1, Rule 1 of the CPC is that where right to relief exists in favour of several

plaintiffs as a result of the same transaction even if the right is several the plaintiffs would be entitled to join in the same suit for the several reliefs the only precondition being that common question of law or fact arose between the plaintiffs. All the conditions of the above provisions of law are completely satisfied and the finding of the lower appellate Court that the suit was multifarious was wrong. That finding is set aside.

13. In connection with the arguments advanced by him Mr.Mhamane relied upon the judgment of Mr.Justice Bhasme in Special Civil Application No. 973 of 1966 (Bom), where following the observations of the Division Bench in Appeal No. 557 of 1952 (Bom) the learned Judge held that the building of which premises form part is destroyed and the landlord puts up a new building in that place then the tenants' right to restoration of possession if any will be strictly governed by the relevant provisions of the Rent Act. In his view, when a house is destroyed, the new premises will not be premises in respect of which the tenant would be entitled to protection under the Rent Restriction Act. The learned Judge was swayed by the observations of the Division Bench.

14. In the result, the appellate decree dated 7th August, 1964 is set aside. The decree passed by the trial Court on August 20, 1963 is restored. It requires to be clarified that the above decree is on the footing that the Petitioners are willing to satisfy all the terms and conditions of the tenancy that existed between the parties.

15. This matter involved a difficult question of law and we do not think that the landlord should be saddled with costs. There will be no order as to costs.

16. Petition allowed.